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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,

Criminal No. 3:21-CR-00155-JD

Plaintiff,

GOVERNMENT'S TRIAL MEMORANDUM

V.

CARLOS E. KEPKE

Defendant.

The United States of America respectfully submits the following Trial Memorandum. Defendant Carlos E. Kepke is charged with one count of conspiracy to defraud the United States under 18 U.S.C. § 371 (Count 1) and three counts of aiding and assisting in the preparation of materially false tax returns under 26 U.S.C. § 7206(2) (Counts 2 – 4). Trial on all counts is scheduled to begin with jury selection on November 28, 2022. A final pretrial conference is scheduled on November 21, 2022, at 1:30 p.m. See ECF No. 91.

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SUMMARY OF THE EVIDENCE

The Government anticipates that the admissible evidence at trial will show the following:

3 Beginning in 1999 and continuing through 2014, Defendant, an attorney, created and managed
4 an offshore trust structure primarily designed for the purpose of tax evasion. Defendant created this
5 structure for Robert Smith, one of his clients. The purpose of this structure was to allow Smith to evade
6 federal income taxes on approximately \$225,000,000 of capital gains income Smith earned from various
7 private equity funds managed by Vista Equity Partners (“Vista”). Vista was founded by Smith in San
8 Francisco and is now based in Austin, Texas. On October 9, 2020, Smith entered into a Non-Prosecution
9 Agreement with the United States. See [https://www.justice.gov/opa/press-](https://www.justice.gov/opa/press-release/file/1327906/download)
10 release/file/1327906/download. As part of that agreement, Smith admitted that Defendant (referred to as
11 Individual B in the Statement of Facts) created and maintained an offshore trust structure for the purpose
12 of hiding Smith’s assets, income, and tax liabilities from the IRS. See [https://www.justice.gov/opa/press-](https://www.justice.gov/opa/press-release/file/1327911/download)
13 release/file/1327911/download. To further this conspiracy, Defendant created and maintained a false
14 paper trail to conceal the fact that Smith controlled and used the assets and income deposited into the
15 offshore trust structure (often with Defendant’s assistance). Smith retained Defendant to create this
16 structure at the behest of Robert Brockman, the primary investor in Vista. One of Smith’s goals in
17 creating the offshore trust structure was to use untaxed money to backstop his personal obligations to
18 Brockman. Although he was aware of the structure’s true purpose, Defendant designed it to create the
19 illusion that it was intended for estate planning and charitable purposes and managed by independent
20 foreign trustees. In practice, however, Defendant’s design allowed Smith to have uninhibited control
21 over the structure, its assets, and income. With Defendant’s assistance, Smith concealed his control over
22 the structure, and used its assets to purchase and renovate real estate in France; Sonoma, California; and
23 Colorado.

24 The offshore trust structure Defendant created for Smith (hereinafter, the “Excelsior/Flash
25 Structure”) consisted of two foreign entities created in 2000: Excelsior Trust (“Excelsior”) in Belize, and
26 Flash Holdings LLC (“Flash”) in Nevis. On paper, Excelsior was a charitable, non-grantor trust for the
27 benefit of Smith, his family members, and unnamed charities in the United States. According to the
28 Excelsior trust indenture, which was drafted by Defendant, Smith was Excelsior’s “Trust Protector”

1 which gave him the authority to remove the trustee at will. The only other official authority Smith had
 2 with respect to Excelsior was a testamentary power of appointment. The Excelsior trust indenture did
 3 not give Smith any authority over the management of Excelsior or its assets. Flash was a holding
 4 company with no employees, business situs, or independent business purpose. Flash did nothing more
 5 than hold investments for Smith. Flash was transferred to Excelsior shortly after its inception and
 6 became Excelsior's wholly owned subsidiary. Excelsior held no assets other than Flash.

7 At the outset, Defendant counseled Smith that the settlor of Excelsior should be someone
 8 unlikely to ever visit the United States—Smith chose Headley Waddington, the uncle of Smith's then-
 9 wife, and a UK citizen.¹ The named trustee of Excelsior was Cititrust International, Inc. ("Citrust"), a
 10 corporate services company in Belize managed by Glenn and Joy Godfrey. Defendant handpicked
 11 Cititrust, having worked with the Godfreys previously. On paper, Excelsior was a charitable, non-
 12 grantor trust for the benefit of Smith, his family members, and unnamed charities in the United States. In
 13 2004, Emil Arguelles, an employee of Cititrust, left to form his own corporate services company, Orion
 14 Corporate & Trust Services Ltd. ("Orion"). Like Cititrust, Orion served as a trust provider in Belize.
 15 And like the Godfreys, Defendant had a close professional relationship with Arguelles and regularly
 16 communicated with him regarding the operation of Excelsior. As Excelsior's so-called "Trust
 17 Protector," Smith had the sole authority to remove the Trustee at his discretion. Eventually, based on
 18 advice from Defendant, Smith directed the removal of Cititrust as trustee, and the appointment of Orion
 19 as the new trustee of Excelsior.

20 The appointments of Waddington, Cititrust, and Orion were intended to give the impression that
 21 Excelsior and Flash were controlled by a detached fiduciary. In reality, Smith made all substantive
 22 decisions regarding the distribution and disbursement of the trust assets either directly or through
 23 Defendant. Smith also unilaterally made all investment decisions regarding income distributed to Flash.
 24 Smith made these decisions without oversight or approval from any of the so-called trustees. Smith used
 25 bank accounts held by Flash as personal bank accounts, financing the purchase of various personal
 26 expenses including investments, art, and luxury real estate.

27

28

¹ Mr. Waddington passed away in March 2020.

1 Flash was designated by Smith as general or limited partner in several of Vista's private equity
 2 funds, including Vista Equity Fund II, LP ("VEF II"). As a named general partner, Flash held half of
 3 Smith's eight-percent interest in VEF II. From 2000 to 2014, Smith designated Flash as a general or
 4 limited partner in nine additional Vista funds, which in turn made distributions of capital gains to Flash.²
 5 With Defendant's assistance, Smith opened several foreign bank accounts in Flash's name at Banque
 6 Bonhôte in Switzerland and VP Bank (BVI Limited) in the British Virgin Islands. Smith was the sole
 7 signatory on all but one of these accounts, and regularly directed the transfer and distribution of funds
 8 from these accounts for personal expenses. Smith directed more than \$12 million from Flash accounts to
 9 purchase and improve his personal residence in Sonoma, California. The purchase agreement for that
 10 transaction lists Smith and his then-wife as the buyers of the property. Some years later, he used these
 11 funds to buy two luxury ski condos in Megève, France. He also used Flash accounts to finance the
 12 purchase of high-priced art for himself or as gifts to others.

13 The Government plans to call Bruce G. Dubinsky, a forensic accounting, fraud, and tax
 14 expert to explain the specifics of the Excelsior/Flash Structure to the Jury. After reviewing the
 15 voluminous evidence in this case, Mr. Dubinsky formed four opinions: (1) that Smith, along with
 16 Defendant, formed a network of offshore entities that engaged in transactions intended to conceal
 17 the true ownership of those assets and help Smith evade taxes; (2) these transactions lacked
 18 economic substance as defined by 26 U.S.C. § 7701(o) and should be disregarded for federal
 19 income tax purposes; (3) that Excelsior trust was a grantor trust in all material respects; and (4)
 20 that Smith's income tax filings from 2010 to 2014 were false because they failed to report the
 21 income distributed to Flash and concealed Smith's control of the Excelsior/Flash Structure.

22 In addition to Smith and Dubinsky, the Government plans to call several other witnesses
 23 involved with the Excelsior/Flash Structure, including current and former employees of Vista,
 24 Orion, Cititrust, and Banque Bonhôte. The Government will also call Robert Mah, Brian Mah,
 25 and Roger Humphreys, who all prepared various partnership income tax returns (Form 1065) for
 26 Vista and its related funds as well as Smith's personal income tax returns (Form 1040); these
 27

28 ² Private equity funds are usually term-limited partnerships. Since its formation, Vista Equity Partners has overseen several private equity funds.

1 three individuals are expected to testify that they were not aware of the Excelsior/Flash Structure
2 when they prepared Smith's income tax returns).

APPLICABLE LAW

I. Economic Substance Doctrine

A. The Doctrine

A transaction lacking “economic substance” is one in which a taxpayer has created the appearance of an economic sale or exchange using a false paper trail, thereby attempting to shift the incidence of taxation to an apparently independent entity. In reality, however, the income in question remains under the dominion and control of the original taxpayer.³ It is settled law that the obligation to pay federal income tax falls on the individual or entity that earns, or otherwise owns, the income in question, and that liability cannot be “escaped by anticipatory assignment” to another individual or entity. *Lucas v. Earl*, 281 U.S. 111, 115 (1930). For the last eight decades, courts have held that the “objective economic reality” of a transaction dictates proper tax treatment. *Gregory v. Helvering*, 293 U.S. 465, 469 (1935) (taxation follows the substance of a transaction rather than its form); *United States v. Boulware*, 552 U.S. 421, 429 (2008) (“objective economic reality” controls taxation) quoting *Frank Lyon Co. v. United States*, 435 U.S. 561, 573 (1978).

In 2010, the economic substance doctrine was codified at 26 U.S.C. § 7701(o).⁴ Section 7701(o) states:

In the case of any transaction to which the economic substance doctrine is relevant, such transaction shall be treated as having economic substance only if - -

(A) The transaction changes in a *meaningful way* (apart from Federal tax effects) the taxpayer's economic position, and

(B) The taxpayer has a *substantial* purpose (apart from Federal Income tax effects) for entering into such a transaction.

(emphasis added)

³ See Joseph Bankman, The Economic Substance Doctrine, 74 S. Cal. L. Rev. 5, 9 (2000).

⁴ The Health Care and Education Reconciliation Act of 2010, § 1409, P.L. 111-152, 124 Stat. 1029 (March 30, 2010).

1 Section 7701(o) codified the objective (Section 7701(o)(A)) and subjective (Section 7701(o)(B))
 2 prongs of the economic substance doctrine.⁵ Section 7701(o) did not alter the economic substance
 3 doctrine developed through prior court decisions.⁶ The economic substance of a series of transactions is
 4 determined by the totality of the facts and circumstances surrounding those transactions, rather than
 5 through analysis of each component part. *See, e.g., Comm'r v. Court Holding Co.*, 324 U.S. 331, 332
 6 (1945) (analyzing the “whole” transaction at issue); *see also True v. United States*, 190 F.3d 1165, 1173-
 7 75 (10th Cir. 1999) (discussing the “step transaction” doctrine and treating separate “steps” as a single
 8 transaction). For income tax purposes, illusory transactions are ignored. *See Court Holding Co.*, 324
 9 U.S. at 334. A false paper trail suggests an effort to present an illusory purpose and effect on the
 10 taxpayer’s economic position.⁷ If a series of transactions lacks economic substance, they are to be
 11 disregarded for income tax purposes, and the income in question becomes taxable to the taxpayer who in
 12 reality owned and controlled that income. *See Gregory*, 293 U.S. at 469.

13 In criminal tax cases, the application of the economic substance doctrine does not alter the
 14 Government’s obligation to prove the defendant acted willfully. *See Cheek v. United States*, 498 U.S.
 15 192, 202 (1991). To meet its burden, the Government must present evidence of defendants’ actions. *See*
 16 *United States v. Barker*, 556 F.3d 682, 688 (8th Cir. 2009); *see also Staples v. United States*, 511 U.S.
 17 600, 616 n. 11 (1994); *United States v. Pierre*, 599 F.3d 19, 23 (1st Cir. 2010) (evidence of falsifying
 18 records proves intent and negates feigning reliance on accountant); *United States v. Santos*, 553 U.S.
 19 507, 521 (2008).⁸

20 Evidence of willfulness in criminal tax cases, where the economic substance is implicated, is
 21 often derived from defendants’ use of shell corporations and trusts to create false paper trails designed to
 22 fraudulently suggest that someone other than the taxpayer earned the taxable income in question, and to
 23

24 ⁵ Charlene D. Luke, *What Would Henry Simons Do?: Using an Ideal to Shape and Explain the*
 25 *Economic Substance Doctrine*, 10 Houston Bus. & Tax L. J. 108 (2010).

26 ⁶ Title 26 U.S.C. § 7701(o)(5)(C) states: “The determination of whether the economic substance doctrine
 27 is relevant to a transaction shall be made in the same manner as if this subsection has never been
 enacted.”

28 ⁷ Bankman *supra* note 3, at 26- 27.

29 ⁸ Bankman *supra* note 3, at 28- 29 (corporate officers that cross the line and falsify implementing tax
 shelter documents knowingly risk criminal sanction).

1 make it appear as if that income is attributable to independent non-taxable (or foreign) entities. See
 2 *United States v. Moran*, 493 F.3d 1002, 1008-9 (9th Cir. 2007) (offshore corporations used to create
 3 fraudulent business deductions for taxpayers); *see also United States v. Wade*, 203 F. App'x 920 (10th
 4 Cir. 2006) (unpublished) (business trusts used to fraudulently conceal taxable income); *United States v.*
 5 *Mikutowicz*, 365 F.3d 65 (1st Cir. 2004) (domestic and foreign entities used to create false business
 6 deductions); *United States v. Noske*, 117 F.3d 1053, 1059-60 (8th Cir. 1997) (domestic business trusts
 7 used to fraudulently conceal taxpayers' business income); *United States v. Klaphake*, 64 F.3d 435 (8th
 8 Cir. 1995) (domestic trust used to conceal taxpayer's farm income). In these cases, the taxpayers did not
 9 report all of their income or claimed a false tax deduction, making the returns at issue materially false.
 10 The determinative factor in each of these cases was the inconsistencies between the documents created
 11 by the defendants, which created one image, and the economic reality of these taxpayers' actions, which
 12 revealed a reality contradictory to the image. The true economic reality of these transactions was
 13 established using evidence of the defendants' own conduct. These factual comparisons can be technical
 14 and are greatly aided by the testimony of expert witnesses, like a forensic accountant or economist, who
 15 can unravel these facts for a jury.

16 **B. Use of Expert Testimony to Discuss Economic Substance**

17 Expert testimony in a criminal tax case regarding a particular series of transactions, or a how a
 18 structure of entities was used, does not usurp the function of the jury and is consistent with application
 19 of *Daubert* and Rule 702. *See Moran*, 493 F.3d at 1008; *see also United States v. Pree*, 408 F.3d 855,
 20 870 (7th Cir. 2005); *Mikutowicz*, 365 F.3d at 72; *United States v. Mohney*, 949, F.2d 1397 (6th Cir.
 21 1992). Such expert testimony constitutes a factual analysis which may assist the jury understanding a
 22 complex series of financial transactions, and the Courts of Appeals have repeatedly held that expert
 23 testimony in a criminal tax case concerning the "proper" tax treatment of a transactions allegedly
 24 lacking "economic substance" is appropriate. *See Moran*, 493 F.3d at 1008-9; *see also, e.g., Wade*, 203
 25 F. App'x at 929-931; *United States v. Turner*, 400 F.3d 491, 499 (7th Cir. 2005) (expert witness
 26 testimony that certain transactions appeared "structured" was not error); *Pree*, 408 F.3d at 870 (IRS
 27 agent may explain analysis of facts in case based on special expertise); *Mikutowicz*, 365 F.3d at 71
 28

1 (testimony by IRS agent which offers an opinion on tax consequences of defendant's transactions
 2 admissible).

3 In *Moran* the Ninth Circuit held that it is entirely appropriate for a retired law school professor to
 4 provide expert testimony concerning the “economic substance” of a series of transactions designed and
 5 implemented by the defendants. *See Moran*, 493 F.3d at 1008-9. The Ninth Circuit also held that an
 6 expert witness may testify about the taxation of a transaction, but not about the mental state of the
 7 defendant, credibility of witnesses, or “legal conclusion[s], i.e., an opinion on an ultimate issue of law.”
 8 *Id.* at 1008. Expert testimony helps the jury unwind a complicated economic transaction and better
 9 consider whether it lacked economic substance. In *Moran*, the Government’s expert witness testified
 10 that although certain entities were validly formed under Costa Rican law, the form of those entities was
 11 not respected. In other words, certain purported loans and derivative transactions were illusory and
 12 lacked economic reality. *Id.* at 1008-9.

13 **II. Grantor and Non-Grantor Trusts**

14 The Internal Revenue Code distinguishes between grantor and non-grantor trusts for income tax
 15 purposes. Under 26 U.S.C. § 674, the grantor—*i.e.*, trustor, settlor, or creator—of a trust “shall be
 16 treated as the owner of any portion of a trust of which the *beneficial enjoyment of the corpus or the*
 17 *income therefrom* is subject to a power of disposition, exercisable by the grantor or a non-adverse party,
 18 or both, without the approval or consent of any adverse party.” (emphasis added). In contrast, a trust
 19 where the initial settlor or creator relinquishes all control of the trust assets is a non-grantor trust. The
 20 initial settlor or creator of a non-grantor trust is not treated as the owner of the trust assets for tax
 21 purposes. But any U.S. person who transfers assets to a foreign trust with U.S. beneficiaries is “treated
 22 as the owner for his taxable year of the portion of such trust attributable to such property.” 26 U.S.C. §
 23 679. Excelsior was a grantor trust. The evidence will establish that Smith was the actual creator of
 24 Excelsior/Flash Structure; contributed all income producing assets to the Excelsior/Flash Structure (the
 25 Vista partnership interests given to Flash); with Defendant’s assistance, unilaterally managed the
 26 Excelsior/Flash Structure; and with Defendant’s assistance, unilaterally expended income from the
 27 Excelsior/Flash Structure for his personal benefit. Yet Defendant counseled Smith to use a foreigner
 28 with no apparent connection to the Excelsior/Flash Structure or its assets as the nominee settlor of

1 Excelsior, and he did so in order to create the false appearance that Excelsior was a non-grantor trust,
 2 and to conceal the fact that Excelsior was actually a grantor trust, and the Smith was the true settlor or
 3 creator.

4 **THE CHARGES**

5 **I. Count 1: 18 U.S.C. § 371 – Conspiracy to Defraud the United States**

6 The elements for Count 1 are:

7 1. The existence of an agreement by two or more persons to commit an offense
 against the United States or to defraud the United States;
 8 2. Defendant's knowing and voluntary participation in the conspiracy; and
 9 3. The commission of an overt act in furtherance of the conspiracy

10 A. **Defendant and Smith agreed to defraud the United States by obstructing the lawful
 functions of the Internal Revenue Service by deceitful and dishonest means**

12 At Brockman's direction, Smith retained the services of Defendant specifically to establish an
 13 offshore structure for the purposes of receiving carried interest income from various private equity funds
 14 formed by Vista. The deceptive nature of the Excelsior/Flash Structure was intended by Brockman,
 15 Smith, and Defendant to mislead and obstruct the Internal Revenue Service. On paper, the
 16 Excelsior/Flash Structure appeared to have been created for estate planning and charitable purposes, and
 17 to be managed by foreigners exercising independent judgment. The economic reality, however, was very
 18 different. With Defendant's assistance, Smith created the Excelsior/Flash Structure as a repository for
 19 his capital gain income, which he initially planned to use to fund potential personal obligations to
 20 Brockman, his primary investor, and made all substantive decisions regarding the income and assets
 21 placed in the Excelsior/Flash Structure.

22 Defendant caused Cititrust to form Excelsior in Belize. After the establishment of Excelsior and
 23 Flash, Defendant regularly communicated with Cititrust regarding the day-to-day operation of Excelsior
 24 and arranged payment of recurring fees to various service providers and corporate managers. Defendant
 25 often communicated with Smith to keep him apprised of the administration of Excelsior and Flash.
 26 Through Defendant, Smith directed the actions of Cititrust and other administrators. Glenn Godfrey, one
 27 of the Cititrust managers working with Defendant, is expected to testify that they regularly took

1 instructions from Smith, through Defendant, regarding the substantive operation of Excelsior. When
 2 Orion took over as Trustee, those instructions were sent by Defendant to Emil Arguelles. Godfrey and
 3 Arguelles are expected to testify that they understood Smith to be the de facto owner of Excelsior assets,
 4 including Flash and its assets. Indeed, they never took substantive actions without Smith's blessing,
 5 communicated through Defendant.

6 **B. Defendant knowingly and voluntarily participated in the conspiracy and was aware
 of its objectives**

7 As an attorney, Defendant advertised himself as an expert in offshore structures used for the
 8 purpose of tax avoidance. Brockman, Defendant's client and Smith's business partner, referred Smith to
 9 Defendant. Smith is expected to testify that Defendant told him that he could form a foreign trust to hold
 10 a portion of Smith's partnership interest in various Vista funds. Defendant would create a paper trail to
 11 falsely suggest that the trust was managed by an independent trustee. In reality, both Defendant and
 12 Smith knew that this was a mirage—Smith would maintain control of these assets without disclosing
 13 them to the IRS.

14 For the 2012-2014 tax years, Smith filed false federal income tax returns that understated the
 15 amount of carried interest and capital gain income Smith received during those years. Communications
 16 between Defendant and third parties reflect Defendant's understanding that Smith had ultimate control
 17 over the Excelsior/Flash Structure. On multiple occasions, Defendant directed third parties, including
 18 Cititrust and corporate managers of Flash in the British Virgin Islands, to avoid using Smith's name on
 19 correspondence or other documents. In at least one instance, Defendant explicitly warned that doing so
 20 would cause adverse tax consequences to Smith. Defendant and Smith also worked to conceal the true
 21 value of various Flash accounts from its corporate managers and so-called fiduciaries because Smith was
 22 concerned that these individuals would take control of the funds that Smith understood to be his.

23 Defendant's modus operandi, knowledge, and intent are revealed by evidence collected by the
 24 IRS during an undercover operation targeting Defendant in 2017 and 2018. During the undercover
 25 operation, undercover agents posing as prospective clients seeking to protect their assets engaged with
 26 Defendant. The scheme Defendant tried to sell the undercover agents was nearly identical to the scheme
 27 he sold to Smith. Both involved: using a family member as a nominee to establish a sham trust using

1 funds surreptitiously provided by the client; installing a nominee, offshore trustee to create the false
2 appearance that the trust was under independent control; creating an offshore holding company;
3 installing a nominee, offshore manager to create the false appearance that the company was under
4 independent control; assigning assets to the holding company; and then allowing the client to control
5 those assets by filtering instructions to the offshore nominees through Defendant. Defendant introduced
6 one of the undercover agents to Emil Arguelles, whose company, Orion, served as trustee of Excelsior
7 for several years. Defendant's advice to the undercover agents was obviously corrupt — as Defendant
8 himself repeatedly advised the undercover agents — specifically designed to defeat taxation on assets
9 held within the offshore structure.

10 Most significantly, Defendant explained to one undercover agent that there could be no
11 legitimate tax benefits if the undercover agent created and funded an offshore trust himself. This is a
12 clear manifestation of Defendant's knowledge of the grantor trust rules described above. Despite his
13 knowledge of the law, however, Defendant advised the undercover agent to create and fund a trust using
14 a nominee so that the IRS would never know that the undercover agent was the true creator and funder.
15 This was not an effort to create a legitimate, non-grantor trust. Rather, it was an effort to create a grantor
16 trust disguised as a non-grantor trust.

17 Similarly, Defendant advised an undercover agent to employ an offshore trustee but made clear
18 that the trustee would be a nominee. He explained that the undercover agent would retain the ability to
19 control assets held in the trust because the trustee would always follow the undercover agent's
20 instructions. This is a clear manifestation of Defendant's knowledge of economic substance doctrine
21 described above. Despite this knowledge of the law, however, Defendant advised the undercover agent
22 to employ a nominee trustee. There is no legitimate reason for installing a nominee trustee. The only
23 purpose a nominee trustee serves is to create the false appearance that a trust is under independent
24 control, and that the act of assigning assets to the trust has some economic substance. When a taxpayer
25 assigns assets to a trust which the taxpayer actually controls, the transaction has no economic substance
26 and is ignored for purposes of federal income tax. Thus, Defendant's advice was not designed to create a
27 genuine transaction which could have some legitimate tax consequences. Rather, it was an effort to
28 create a transaction which appeared to have economic substance but had none.

1 **C. Defendant and Smith committed overt acts in furtherance of the conspiracy**

2 The Government must prove that Defendant or Smith committed “any act to effect the object of
 3 the conspiracy.” 18 U.S.C. § 371. The Government is only required to show a single act in furtherance
 4 of the conspiracy. *See United States v. Turchin*, 21 F. 4th 1192, 1203 (9th Cir. 2022) (conviction under
 5 Section 371 requires only “*an* overt act in furtherance of the agreement” (emphasis added)).

6 Nevertheless, the acts committed by Defendant and Smith were numerous, and the indictment lists many
 7 overt acts committed over approximately 15 years. *See* Indictment ¶¶ 29 – 50. Defendant spearheaded
 8 the establishment of the Excelsior/Flash Structure in Belize and Nevis. He drafted the Excelsior trust
 9 indenture, caused Excelsior to be created in Belize, and caused Flash to be created in Nevis. Defendant
 10 worked with Smith to open bank accounts in the British Virgin Islands and Switzerland nominally held
 11 by Flash, but ultimately controlled by Smith. Defendant helped Smith spend money held in Flash’s
 12 name for his own personal benefit, including to purchase real estate in France, Sonoma, California, and
 13 Colorado. For the years 2012 through 2013, Smith caused his personal income tax returns to be prepared
 14 in San Francisco, and those returns were false because they did not accurately report carried interest and
 15 capital gain income distributed by Vista to Flash. All of these acts are overt acts in furtherance of the
 16 conspiracy.

17 **II. Counts 2 to 4: 26 U.S.C. § 7206(2) – Aiding in the Preparation of False Tax Returns**

18 The elements for Counts 2 through 4 are:

- 19 1. Defendant aided or assisted in, procured, counseled, or advised the preparation or
 20 presentation of a document in connection with a matter arising under the internal
 revenue laws;
- 21 2. the document was false as to a material matters; and
- 22 3. Defendant acted willfully.

23 **A. Defendant aided, procured, counseled, and advised the preparation of Smith’s
 24 income tax returns for the 2012-2014 tax years**

25 There is no requirement that Defendant participated in the actual preparation of the false tax
 26 returns in order to be convicted under Section 7206(2). *See United States v. Smith*, 424 F.3d 992, 1009
 27 (9th Cir. 2005) (“[T]he plain language of § 7206(2) is satisfied by aid, assistance, procurement, counsel,
 28 or advice in the preparation or presentation of a false or fraudulent return—there need not be actually

preparation of the return at issue.”). As described above, Defendant aided Smith in creating and maintaining an offshore trust structure designed to hide Smith’s income and assets from the IRS. Flash was listed as a general partner of various Vista funds, and from 2005 to 2014 over \$225 million of carried interest and capital gain income was distributed by Vista to Flash. Since the independent character of the Excelsior/Flash Structure was an illusion, and the structure lacked economic substance, Smith was the de facto grantor of that Trust. As a result, Smith was taxable on income paid into the structure. Defendant devised this scheme knowing that the principal objective of setting up the structure was to allow Smith to evade his tax obligations. So, while Defendant may not have put pen to paper, he willingly participated in the scheme, and acted to fulfill its objectives.

The returns at issue were prepared by Robert Mah, Brian Mah, and Roger Humphries from Mah & Associates, an accounting firm in San Francisco. All three are expected to testify that they were not aware of the Excelsior/Flash Structure when they prepared Smith's income tax returns, they were not retained to audit or look behind any of the information provided to them by Smith and his representatives, and that they presumed that information was complete and accurate.

Defendant aided and advised Smith in the preparation of his tax returns by acting as his intermediary to various banks, trust companies, and corporate managers. Denise Davis, the then-Director of Finance at Vista, is expected to testify that Vista employees were instructed to communicate with Defendant regarding Flash rather than with Smith directly. Aside from setting up the Excelsior/Flash Structure on Smith's behalf, Defendant opened bank accounts for the various entities within the structure and advised Smith how to purchase real property through nominees.

B. Smith's individual tax returns for tax years 2012-2014 were false as to a material matter

The Ninth Circuit has held that “any failure to report income is material.” *United States v. Holland*, 880 F.2d 1091, 1096 (9th Cir. 1989). Here, the Government’s forensic accounting and tax expert, Bruce G. Dubinsky, calculated that Smith’s federal income tax returns for 2012-2014 omitted approximately \$195 million in taxable income received by the various Excelsior/Flash entities. The income should have been reported by Smith on his tax returns because Smith was the primary contributor of assets to the Excelsior/Flash Structure and maintained complete dominion and control

1 over the structure. Applying the economic substance doctrine, the Excelsior/Flash Structure is
 2 disregarded for income tax purpose, and the distributions to Flash are treated as distributions directly to
 3 Smith. Accordingly, under 26 U.S.C. § 674, Smith is treated as the owner of the income directed into the
 4 Excelsior/Flash Structure, requiring him to report it on his federal income tax returns. As a result,
 5 Smith's income tax returns for the years 2012-2014 were false because they failed to report millions of
 6 dollars' worth of income on Line 13, which is used, along with Schedule D, to report sales of capital
 7 assets such as stocks or bonds.

8 **C. Defendant acted willfully**

9 Willfulness under Section 7206(2) requires "that the accused must know or believe that his
 10 actions will likely lead to the filing of a false return." *United States v. Greer*, 607 F.2d 1251, 1252 (9th
 11 Cir. 1979). As discussed above, Smith used Defendant as a buffer between him and the Excelsior/Flash
 12 Structure. For nearly 15 years, Defendant communicated Smith's instructions to various bankers and
 13 corporate managers. Defendant created a false paper trail to give the impression that Excelsior was
 14 controlled by a neutral trustee and that Smith had relinquished control of any trust assets. This was a
 15 complete ruse. Smith specifically retained Defendant to create a structure that would aid Smith evade
 16 taxes he earned from various Vista funds. The Government expects to present evidence that Defendant
 17 counseled others on how to create distance between Excelsior and Smith to maintain the appearance that
 18 someone other than Smith was in control. Otherwise, Defendant would say, Smith would face tax
 19 consequences.

20 The fact that Defendant understood that federal tax law imposes a duty on taxpayers to report
 21 income generated by offshore trusts they create and fund, and also income they assign to offshore trust
 22 they completely control, is well-illustrated by the undercover evidence. During the undercover
 23 operation, Defendant was recorded explaining the law to prospective clients, and then advising that
 24 those prospective clients violate the law by engaging in transactions with no legitimate purpose other
 25 than obscuring reality and confusing the IRS.

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EVIDENTIARY ISSUES

I. Co-conspirator statements under Fed. R. Evid. 801(d)(2)(E)

Evidence of a co-conspirator's statements during and in furtherance of the conspiracy are not hearsay. See Fed. R. Evid. 801(d)(2)(E); see also *Bourjaily v. United States*, 483 U.S. 171, 175 (1987); *United States v. Bowman*, 215 F.3d 951, 960-61 (9th Cir. 2000). Such statements do not create a *Crawford* issue because they are non-testimonial. *Crawford v. Washington*, 541 U.S. 36, 55 (2004); see also *Giles v. California*, 554 U.S. 353, 375 n.6 (2008); *United States v. Allen*, 425 F.3d 1231, 1235 (9th Cir. 2005). On August 15, 2022, the Government notified Defendant of its intent to produce evidence of statements made by the following individuals pursuant to Rule 801(d)(2)(E):

- Robert Smith
- John Warnken-Brill
- Glenn Godfrey
- Joy Godfrey
- Emil Arguelles
- Evatt Tamine
- Robyn Neal
- Michele Frutiger

On November 7, 2022, the Government provided Defendant with notice that is also considers Robert Brockman an unindicted co-conspirator and intends to introduce statements Brockman made to Smith about Defendant and creating the Excelsior/Flash Structure. See ECF 121. Smith, a co-conspirator named in the indictment, will be testifying at trial. The Government does not plan to call John Warken-Brill (CFO of Vista) or Evatt Tamine as witnesses at trial. At the October 20 status hearing, the Government stated that a James hearing is not necessary, and the Court appeared to agree. See ECF 110, Transcript of 10/20/22 Status Conference at 66:1-67:23.

II. Admission of undercover recordings and transcripts

On August 10, 2022, the Government filed a motion in limine to admit evidence consisting of audio records and transcripts collected by the IRS undercover agents in this case. At the October 20 hearing, the Court reserved ruling on this motion and provided the Government with an opportunity to

1 narrow the body of this evidence and encouraged the Parties to stipulate to some of this evidence, where
 2 possible. *See ECF 110, Transcript of 10/20/22 Status Conference at 25:9-27:5.* While the parties were
 3 not able to stipulate to the admission of any portion of the undercover recordings and transcripts, the
 4 Government filed a supplemental motion in limine to admit a reduced set of this evidence. ECF 125.
 5 Defendant filed a response on November 14. ECF 147. That motion is pending.

6 **III. Statements of Defendant under Fed. R. Evid. 801(d)(2)(A)**

7 To the extent that the Defendant objects on hearsay grounds to the admission of his statements,
 8 the Government intends to argue that such statements are non-hearsay under Fed. R. Evid. 801(d)(2)(A)
 9 and admissible. *See ECF 123 (Government's Motion in Limine); ECF 152 (Defendant's response).*

10 **IV. Outstanding Stipulations Sent to Defendant**

11 The Government has proposed a total of five stipulations to Defendant. On November 15, the
 12 parties conferred telephonically regarding these stipulations.

13 **A. Stipulation Regarding Redactions**

14 On October 11th, the Government sent Defendant a stipulation proposing modifications to the
 15 redaction procedures for trial exhibits set forth in Rule 49.1(a). The Government filed an agreed
 16 stipulation on November 3rd, and it remains pending. *See ECF 113.*

17 **B. Stipulation regarding authenticity of tax returns**

18 On October 19th, the Government sent Defendant a proposed stipulation regarding the
 19 admissibility of tax returns the Government intends to introduce as exhibits at trial which were identified
 20 by Bates number in the stipulation. Defendant has represented that he will stipulate to the admissibility
 21 of the tax returns at issue in this case, and the parties anticipate filing a stipulation ahead of the final
 22 pretrial conference.

23 **C. Domestic records of regularly conducted activity under Fed. R. Evid. 902(11) and
 24 803(6)**

25 On October 19th, the Government sent Defendant a proposed stipulation regarding the
 26 admissibility of certain business records the Government intends to introduce as exhibits at trial under
 27 Rules 803(6) and 902(11). These records were identified by Bates number in the stipulation. Discussions
 28

1 regarding this stipulation are ongoing. If the parties can come to an agreement, the Government expects
 2 that a stipulation will be filed prior to the final pretrial conference.

3 **D. Foreign records of regularly conducted activity under 18 U.S.C. § 3505 and Fed. R.
 Evid. 902(12)**

4 On November 8th, the Government sent Defendant notice of its intent to seek admission of
 5 foreign records of regularly conducted activity under 18 U.S.C. § 3505 and Fed. R. Evid. 902(12). This
 6 evidence consists of: (1) business records of Orion and Cititrust in Belize; (2) business records of
 7 Banque Bonhôte in Switzerland; and (3) business records of First Caribbean International Bank in the
 8 Cayman Islands. The Government also sent Defendant a proposed stipulation regarding the authenticity
 9 of this evidence, identified by exhibit and Bates number, allowing Defendant to make other objections
 10 on relevance, hearsay, or other non-authenticity grounds. Discussions regarding this stipulation are
 11 ongoing. If the parties can come to an agreement, the Government expects that a stipulation will be filed
 12 prior to the final pretrial conference.

13 **E. Stipulation regarding the authenticity of evidence obtained via search warrant**

14 On November 8th, the Government sent Defendant a proposed stipulation as to the authenticity
 15 of evidence obtained via search warrant. During its investigation, the Government obtained evidence via
 16 multiple search warrants executed at the homes of Defendant and Evatt Tamine, as well as electronic
 17 search warrants executed on Defendant's email account. The Government has asked Defendant to
 18 stipulate to the authenticity of the evidence, identified by exhibit and Bates number, allowing Defendant
 19 to make other objections on relevance, hearsay, or other non-authenticity grounds. Discussions
 20 regarding this stipulation are ongoing. If the parties can come to an agreement, the Government expects
 21 that a stipulation will be filed prior to the final pretrial conference.

22 **V. Summary evidence under Fed. R. Evid. 1006**

23 On November 3rd, the Government sent Defendant two Rule 1006 summaries of voluminous
 24 Vista financial records prepared by Denise Davis, identified as Exhibits 240 and 241 on the Exhibit List
 25 filed by the Government on November 9, 2022. *See* ECF 138 at 21. In addition, the Government
 26 previously gave notice of its intent to use Rule 1006 evidence, and why such evidence is appropriate.
 27 *See* Not. Of Intent to Offer Expert Testimony and Summaries of Voluminous Evid. at 9-11, ECF No. 45.
 28

1 These exhibits summarize the flow of distributions from Vista and its various funds to its limited
2 partners, including Flash. The underlying evidence was previously produced to the Defense, and the
3 Government is prepared to produce them in court if requested by the Court.

4

5 Dated: November 15, 2022

6 STEPHANIE M. HINDS
7 United States Attorney

8 /s Corey J. Smith
9 COREY J. SMITH
10 Senior Litigation Counsel, Tax Division
11 MICHAEL G. PITMAN
12 Assistant United States Attorney
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